No. 91-810

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

CITY OF BURLINGTON,

*Petitioner*,

v.

ERNEST DAGUE, SR.; ERNEST DAGUE, JR.; BETTY DAGUE; and ROSE A. BESSETTE,

*Respondents*.

***ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT***

# BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial percentage of its resources to advancing the interests of the free enterprise system. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases affecting business.

WLF believes that our nation's free enterprise system has suffered greatly in recent decades as a result of the litigation explosion that has clogged both state and federal courts. While WLF fully supports enforcement of our nation's environmental and civil rights laws, WLF believes that the chief result of providing contingency enhancements to the attorney fees awarded to prevailing plaintiffs in environmental and civil rights cases will be to line the pockets of the nation's lawyers at the expense of taxpayers and to increase the quantity of unmeritorious lawsuits clogging our courts.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus* in the federal courts on a number of occasions. AEF believes that the public interest is best served by a legal system that does not overcompensate lawyers and does not provide too many incentives for the filing of lawsuits.

*Amici* are particularly eager to file their brief in order to dispel any notion -- that might arise due to the anticipated filing of several *amicus* briefs by attorney groups on behalf of Respondents -- that lawyers as a group support the award of contingency enhancements as a part of attorney fees awarded under federal fee-shifting statutes. Many lawyers, including those at WLF, share the public's distaste for the large attorney fees often awarded under those statutes. Indeed, WLF has had a policy of never seeking an award of attorney fees as the prevailing party in litigation.

Both WLF and AEF appeared as *amici* in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991)(*en banc*), arguing that lodestar fees awarded under federal fee-shifting statutes should not be enhanced to compensate the plaintiff's attorney for assuming the risk of nonrecovery. Neither WLF nor AEF has any financial interest in the outcome of this case and thus can assist the Court by providing a perspective that is distinct from that of either party.



*Amici* submit this brief on behalf of Petitioner with the written consent of both parties. The written consents are on file with the Clerk of the Court.

## STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case set forth in Petitioner's brief.

In brief, Respondents (owners of land adjacent to a landfill operated by Petitioner City of Burlington, Vermont) brought suit in federal district court against Burlington, alleging that the city was operating the landfill in violation of a variety of federal and state laws. Respondents retained William W. Pearson to represent them in the lawsuit, under an arrangement that called for the payment of no attorney fees unless Respondents prevailed.

Following a bench trial, the district court entered judgment for Respondents on some, but not all, of their claims. Pet. App. 59-115. The district court subsequently awarded attorney fees to Respondents pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d) -- the fee-shifting provisions of the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act, respectively. Pet. App. 130-134.[1] The court awarded Respondents their "lodestar" fee ($198,027.50)[2] and then added a 25% contingency enhancement ($49,506.87) that was in-

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[1] The two provisions are identically worded; they provide for an award of "reasonable attorney and expert witness fees" to any party, whenever appropriate.

[2] The computation of Respondents' "lodestar" fee (the reasonable number of hours worked by Respondents' attorneys multiplied by a reasonable hourly fee) was not disputed.

tended to compensate Respondents' attorney for having assumed the risk that he would receive nothing had Respondents not prevailed. The district court explained its decision to award a contingency enhancement by stating that Respondents' "risk of not prevailing was substantial under the facts here" (Pet. App. 132) and that "absent an opportunity for enhancement, [Respondents] would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law." Pet. App. 133.

Burlington appealed the entire judgment, including the award of attorney fees, to the United States Court of Appeals for the Second Circuit. On June 12, 1991, the Second Circuit affirmed the decision of the district court in all respects. Pet. App. 1-37. With respect to the contingency enhancement issue, the Second Circuit held that the "critical inquiry" was "'whether without the possibility of a fee enhancement . . . competent counsel might refuse to represent clients thereby denying them effective access to the courts.'" Pet. App. 37 (quoting *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987)). Applying that standard, the appeals court upheld the district court's decision to award a contingency enhancement. *Id.*

Respondent subsequently filed motions seeking additional attorney fees for work performed in the appeals court and for work performed in the trial court for the period following October 1989. Burlington did not respond to either motion.[3] The Second Circuit awarded

[3] Respondents asserted in their opposition to the petition for certiorari that Burlington had in some way waived its objection to all attorney fee awards by failing to respond to the two subsequent fee requests. Resp. Br. at 22. That assertion is without merit. Burlington objected to the district court's initial attorney fee award (including a specific objection to the contingency enhancement) at all appropriate opportunities before the Second Circuit and this Court, including in its petition for certiorari. *See* Pet. at 25-27. Regardless whether (continued...)



appellate fees but declined Respondents' request for a contingency enhancement above the lodestar amount, stating, "The 'risk' involved in defending an appeal is not significant and in the circumstances of this case, calls for no enhancement of the 'lodestar' amount." Pet. App. 38-39. The district court's supplemental attorney fee award covering the period October 1989 to October 1991 included a 25% contingency enhancement (amounting to $6,028.00) based on the court's "previous findings" regarding the need for enhancement. Pet. App. 137-138.

On November 18, 1991 Burlington filed its petition for a writ of certiorari, seeking review of all aspects of the Second Circuit's June 12, 1991 decision. The Court granted the petition, limited to the question whether the district court had acted properly in awarding a contingency enhancement in excess of the lodestar amount.

## SUMMARY OF ARGUMENT

The district court based its award of a contingency enhancement to a significant degree on its finding that Respondents, at the time they filed suit, faced a substantial risk of not prevailing. While this Court has been divided on the issue of whether contingency enhancements should ever be awarded, it has been unified in holding that the plaintiff's likelihood of success at the time suit is filed is irrelevant in determining whether a contingency enhancement is justified. Accordingly, regardless how the Court ultimately rules regarding the availability of contingency enhancements, the 25% enhancement awarded in this case should be overturned because it was based in part on the Court's evaluation of Respondent's likelihood of success.

[3] (...continued)
Burlington has preserved its rights to appeal from subsequent fee awards, there is no basis for asserting that failure to preserve such rights constitutes a waiver of the rights that clearly were preserved.

Moreover, even assuming that the Court rules that contingency enhancements are appropriate in some exceptional circumstances, this case is not one of those circumstances. Respondents have not even alleged that their attorney would not have taken the case but for the prospect of a contingency enhancement; in the absence of such an allegation, enhancement is never appropriate, because the sole justification for awarding contingency enhancements is to ensure that plaintiffs with meritorious claims are not left without representation. Also, the fact that Respondents were suing for money damages makes their case that much more attractive to potential lawyers and, therefore, that much less likely a candidate for contingency enhancement.

Finally, although the Court need not reach this issue in order to rule for Burlington, *amici* submit that contingency enhancements are never appropriate in suits brought under federal fee-shifting statutes. The lodestar amount awarded in such cases should adequately compensate the plaintiff. *Amici* submit that the plurality opinion in *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air* [*Delaware Valley II*], 483 U.S. 711 (1987), and of the D.C. Circuit in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991)(*en banc*), are persuasive in demonstrating that contingency enhancements are inappropriate. It may be that some lawyers will suffer hardship in the absence of contingency enhancements, but the purpose of the federal fee-shifting statutes is to ensure the vindication of the federal-law rights of individuals, not to provide full employment for lawyers.



## ARGUMENT

### I. *DELAWARE VALLEY II* ESTABLISHED THAT REGARDLESS WHETHER CONTINGENCY ENHANCEMENTS UNDER FEDERAL FEE-SHIFTING STATUTES ARE EVER APPROPRIATE, THEY SHOULD NEVER BE BASED ON THE PLAINTIFF'S LIKELIHOOD OF SUCCESS

Any discussion of the award of contingency enhancements to prevailing plaintiffs in cases brought pursuant to statutes containing fee-shifting provisions must begin with the Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* [*Delaware Valley II*], 483 U.S. 711 (1987), the only prior occasion on which the Court has dealt directly with the contingency enhancement issue.[4] Unfortunately, guidance available from that decision is extremely limited due to the absence of any opinion that commanded the support of a majority of the members of the Court. But the Second Circuit was not justified in concluding that the splintered nature of *Delaware Valley II* gave it license to ignore the decision altogether; in doing so, the Second Circuit ended up applying a standard for the award of contingency enhancements that no member of the *Delaware Valley II* court would have been willing to accept.

The justices split into three groups in the *Delaware Valley II* decision. Five justices (Chief Justice Rehnquist and Justices O'Connor, Powell, Scalia, and White) held that the prevailing plaintiffs had failed to establish an entitlement to attorney fees in excess of the lodestar fee as compensation for the risk that they would have been awarded no fees if they had not prevailed (referred to

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[4] While *Delaware Valley II* involved a federal fee shifting statute not at issue here (§ 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d)), the Court has said that its standards for determining "reasonable" fees apply to all federal statutes awarding "reasonable" attorney fees to a "prevailing party." *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

herein as a "contingency enhancement"). Four of those five justices held (in a plurality opinion written by Justice White) that contingency enhancements are *never* warranted under federal fee-shifting statutes because those statutes provide only for payment of a "reasonable" fee, and the lodestar fee is a presumptively reasonable fee. *Id.* at 727-28.[5] The fifth justice (Justice O'Connor) stated that while in some cases contingency enhancements may be appropriate, the plaintiffs in *Delaware Valley II* were ineligible for such enhancements because they failed to show: (1) that contingency enhancements "were necessary to attract competent counsel in the relevant community"; and (2) that in the absence of the prospect of a contingency enhancement, the applicant would have faced "substantial difficulties" in obtaining counsel. *Id.* at 733-34 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor made clear her belief that contingency enhancements are not to be the norm by concurring in the judgment of the Court that the plaintiffs were not even entitled to a remand for purposes of establishing their entitlement to a contingency enhancement under the standards enunciated in *Delaware Valley II*.

Four dissenters (Justices Blackmun, Brennan, Marshall, and Stevens) stated that contingency enhancements should be available under some circumstances. The dissenters would have remanded the case for a redetermination of any contingency enhancements, to be based primarily on a determination of the extent to which the relevant legal market compensated for contingency. *Id.* at 754 (Blackmun, J., dissenting).

All nine justices appear to have been in substantial agreement on that last point -- that any contingency enhancement should focus primarily on market-wide condi-

[5] Justice White's plurality opinion went on to state that even if contingency enhancements were ever appropriate, in no event should they be awarded except in "exceptional cases" where without contingency enhancement the plaintiff "would have faced substantial difficulties in finding counsel." *Id.* at 728, 731.



tions rather than on an individual plaintiff's circumstances. *See id.* at 731 (O'Connor, J., concurring in part and concurring in the judgment)("I also agree [with the dissent] that compensation for contingency must be based on the difference in market treatment of contingency fee cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case"); *id.* at 731 (pluralty opinion)(focus of risk enhancement determination should be difficulty faced by "poor clients with good claims" in finding counsel within the local legal market, not "the risk of winning or losing in a specific case").

The Second Circuit, in choosing to ignore *Delaware Valley II*, has adopted a standard that cannot be squared with any of the three opinions in that case. The Second Circuit endorsed the district court's conclusion that a contingency enhancement was appropriate in this case in part because "the risk of not prevailing was substantial." Pet. App. 37. The district court's reliance on a factor considered irrelevant by all nine *Delaware Valley II* justices requires reversal. Even if the Court ultimately decides that contingency enhancement is appropriate in certain situations, the Court at least should remand the case with directions that the contingency enhancement issue be considered anew -- this time without reference to Respondents' likelihood of success at the start of the litigation.

The reasons why a particular plaintiff's likelihood of success should play no role in the contingency enhancement decision are readily apparent. Perhaps most importantly, permitting consideration of likelihood of success would have the perverse effect of giving the strongest incentives for litigation to those with the weakest claims, since those with the weakest claims would be able to command the highest contingency enhancements if they ultimately prevailed. The only justification for such a rule would be a determination that all those contemplating suit under a statute with a fee-shifting provision (regardless whether their claim is strong is weak) should have an equal opportunity to retain lawyers to press their claims.

There is no indication that Congress ever made such a determination. To the contrary, Congress adopted fee-shifting statutes to permit the vindication of statutory rights, not to promote speculation in litigation. Society is best served by a legal system that facilitates the filing of highly meritorious claims but that does nothing to encourage highly doubtful claims. If clients and their lawyers wish to bring highly doubtful claims, they ought to be willing to assume for themselves the risk that they will not prevail.

Moreover, the issue of whether a contingency enhancement should be awarded will only arise after a plaintiff has prevailed. Once counsel and the trial judge know the outcome of the case, it is highly unlikely that they can objectively evaluate the plaintiff's chances of success from the perspective of an attorney first considering whether to take on the case. *See Delaware Valley II*, 483 U.S. at 722 (plurality opinion).

Finally, this Court has long recognized that fee award disputes should not be permitted to turn into lengthy satellite litigation. *See, e.g., Hensley*, 461 U.S. at 437. To permit parties disputing fee awards to litigate the strength of the plaintiff's case as of the start of the litigation (a dispute in which, ironically, the roles would be reversed, each party stressing the weaknesses in his own case) would be an open invitation to such satellite litigation.

In sum, the Second Circuit erred in upholding a contingency enhancement that was based in substantial part on the district court's determination that, at the start of the litigation, the plaintiff's risk of not prevailing was substantial. That error requires reversal; at the very least, Burlington is entitled to a remand for a redetermination of the contingency enhancement issue undertaken without regard to Respondent's likelihood of success at the start of the litigation.



## II. RESPONDENTS HAVE FAILED TO ESTABLISH THAT THIS IS ONE OF THOSE RARE CASES IN WHICH CONTINGENCY ENHANCEMENT IS APPROPRIATE

Although *Delaware Valley II* indicates that the justices have been closely divided on the question of whether contingency enhancements are ever permissible, a solid majority of the Court has held that any enhancement of attorney fees above the lodestar amount is to be the exception rather than the rule. Thus, in *Blum v. Stenson*, 465 U.S. 886 (1984), the Court stated that the reasonable number of hours worked times a reasonable hourly rate (the lodestar amount) "is presumed to be the reasonable fee contemplated" by a federal fee-shifting provision and that only in a "rare case" will an upward adjustment to that "presumptively reasonable fee" be appropriate. *Blum*, 465 U.S. at 897, 901 n.18. Similarly, in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* [*Delaware Valley I*], 478 U.S. 546 (1986), the Court cited the language from *Blum* quoted above, stated that there is a "strong presumption" that the lodestar figure is the statutorily prescribed "reasonable" fee, and concluded, "Although upward adjustments of the lodestar figure are still permissible, . . . such modifications are proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower court." *Delaware Valley I*, 478 U.S. at 565 (quoting *Blum*, 465 U.S. at 898-901). The Court has made clear that the fee applicant "bears the burden of entitlement to an award." *Hensley*, 461 U.S. at 437.

Supreme Court decisions issued since *Delaware Valley II* employ equally strong language in holding that upward adjustment of the lodestar figure is to be reserved for rare and exceptional cases. For example, in *Blanchard v. Bergeron*, 109 S. Ct. 939, 945 (1989), the Court cited *Delaware Valley I* for the proposition that there exists a "strong presumption" that the lodestar figure is the fee to be awarded under a fee-shifting provision. Nothing in

*Blanchard* suggests that the Court believed that *Delaware Valley II* had affected that presumption in any way.

While the aforementioned case law does not absolutely rule out the award of a contingency enhancement in this case, it does make clear that Respondents face a monumental task in overcoming the presumption that the lodestar figure is the fee to be awarded in this case and in convincing the Court that this is one of those "rare" and "exceptional" cases in which an upward adjustment of the lodestar figure is warranted.

The record in this case indicates that the upward adjustment of Respondents' fee award was unwarranted. *Delaware Valley I* requires that, at a minimum, any contingency enhancement award be supported by "detailed findings by the lower court." *Delaware Valley I*, 478 U.S. at 565. The district court's conclusion that Respondents would have faced substantial difficulty in obtaining counsel of reasonable skill and competence absent an opportunity for contingency enhancement is not supported by any "detailed findings," but solely by a vague reference to "memoranda and affidavits" on file. Pet. App. 133.

The affidavits submitted by Respondents consisted of statements by Mr. Pearson and other attorneys to the effect that no attorney besides Mr. Pearson would have taken Respondents' case. But the affidavits no where suggest that Respondents would have had any difficulty in obtaining counsel absent the availability of contingency enhancements. For example, Mr. Pearson does not state that he would not have accepted the case but for the opportunity for contingency enhancement.[6] In the absence of such

[6] Mr. Pearson's affidavit is devoted primarily to establishing his special skill in handling complex environmental litigation and that he was one of the few qualified attorneys in Vermont willing to handle such litigation on an other-than-hourly-rate fee basis. Mr. Pearson's skills should be reflected in the district court's lodestar fee (continued...)



evidence, Respondents have not even begun to establish that this is one of those "rare" and "exceptional" cases in which an upward adjestment of the lodestar amount is warranted.

Moreover, even if Mr. Pearson had claimed that he would not have accepted the case but for the opportunity for contingency enhancement, that type of evidence should be viewed with an extremely critical eye. As the D.C. Circuit has explained in declining to accord weight to such attorney affidavits:

> We do not think that we can accept such evidence as meeting the substantial difficulties test [established in *Delaware Valley II*]. Without in any way denigrating the *bona fides* of these lawyers, we cannot blink the fact that they are obviously self-interested. We think it is indisputable that if such evidence were treated as determinative, or even weighty, the substantial difficulties test would be so easily met as to become a mere formality. The Supreme Court has itself recently disparaged such anecdotal evidence from attorneys unconnected with the case in the context of attorney's fees disputes. *See United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990)*(holding such evidence to be "blatently insufficient" to raise a constitutional doubt about federal limits on attorney's fees, "even if entirely unrebutted").

*King v. Palmer*, 950 F.2d at 779.

Also, to permit reliance on such attorney affidavits would be in effect to allow in evidence of the strength or weakness of the fee applicant's claim at the time of filing suit, a factor that all nine justices in *Delaware Valley II*

[6] (...continued)
determination, but they are irrelevant to the contingency enhancement issue.

said should not be considered in contingency enhancement determinations. That is so because "surely the principal reason a lawyer will turn down a case under a fee-shifting statute" is his/her belief that the case is unlikely to prevail -- rather than an aversion to taking any non-fee-paying cases. *Id.* at 780. Thus, courts should not rely on such attorney affidavits in making contingency enhancement determinations, because "[i]f the courts cannot . . . directly [consider the risks undertaken by an individual fee applicant], how can it be appropriate to do so vicariously through the eyes of lawyers who declined the case?" *Id.*

Finally, Respondents' complaint included a claim for money damages. There can be little justification for awarding contingency enhancements in cases, as here, involving significant damage claims (as opposed to cases where the only claims are for injunctive relief). Such cases are particularly attractive to lawyers because any judgment recovered could be earmarked for the payment of attorney fees. Any attorney who did not believe that the prospect of recovering a lodestar fee was sufficient incentive to take Respondents' case could have increased the incentive by entering into a fee agreement with Respondents whereby Respondents would agree to pay as an attorney fee a percentage of whatever recovery they received (in addition to whatever fee might be ordered by the court).

The Supreme Court unanimously held that such contingency agreements are fully enforceable by attorneys, even when the fee award as computed under a contingency agreement far exceeds any award that the attorney could have hoped to receive from the court. *Venegas v. Mitchell*, 110 S. Ct. 1679 (1990).[7] Even before the

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[7] In *Venegas*, the district court awarded fees of $117,000 under 42 U.S.C. § 1988, of which $75,000 was attributable to work done by Mitchell, the plaintiff's first lawyer. Mitchell had entered into a contingency fee agreement with the plaintiff calling for payment of 40% of the gross amount of any recovery. The plaintiff obtained a (continued...)



Supreme Court's decision, the enforceability of such agreements was not open to serious question; most of the courts of appeals that had addressed the issue had ruled that such agreements were fully enforceable. *See Venegas v. Skaggs*, 867 F.2d 527 (9th Cir. 1989); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 923 (8th Cir. 1986); *Sullivan v. Crown Paper Board Co.*, 719 F.2d 667, 669-70 (3d Cir. 1983). Consequently, an attorney reviewing Respondents' case at the time they were seeking to file suit would have had more than sufficient financial incentive to agree to take the case, even in the absence of the prospect of contingency enhancements.

In sum, regardless whether contingency enhancements are ever properly awardable in cases brought under federal statutes with fee-shifting provisions, this case clearly is not one of those "rare" and "exceptional" cases that are the only conceivable candidates for the award of contingency enhancements. There simply is no evidence[8] that Respondents would not have been able to find competent counsel but for the prospect that a contingency enhancement could be recovered.

## III. CONTINGENCY ENHANCEMENTS ARE NEVER APPROPRIATE UNDER FEDERAL FEE-SHIFTING STATUTES

In light of the Court's inability to speak with a clear voice in *Delaware Valley II* regarding the availability of

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[7] (...continued)
judgment in his favor of $2.08 million. The Supreme Court held that Mitchell was entitled to full enforcement of the contingency fee agreement, even though the fee due under that agreement was many times the "reasonable" fee awarded pursuant to 42 U.S.C. § 1988 by the district court to the plaintiff for work performed by Mitchell. *Id.*, 110 S. Ct. at 1682-84.

[8] Other than the evidence that Respondents' risk of not prevailing was substantial at the time suit was filed; as noted above, *Delaware Valley II* makes clear that such evidence may not properly be considered.

contingency enhancements under federal fee-shifting statutes, the courts of appeals have had to fend for themselves in resolving that issue. Not surprisingly, they have reached conflicting results.

A few circuits, such as the Second Circuit in this case, have been relatively liberal in the award of contingency enhancements and by and large have left such decisions to the sound discretion of the district courts. Such circuits have routinely approved contingency enhancements of as much as 100% of the lodestar amount. *See, e.g., Bernardi v. Yeutter*, 942 F.2d 562, 565-66 (9th Cir. 1991). Other circuits have recognized the possibility that contingency enhancements could be awarded under exceptional circumstances but have established sufficiently high barriers to such awards that in practice contingency enhancements are almost never awarded. *See, e.g., Smith v. Freeman*, 921 F.2d 1120, 1123 (10th Cir. 1990); *Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324, 327 (4th Cir. 1989); *Leroy v. City of Houston*, 831 F.2d 576, 583 (5th Cir. 1987). The D.C. Circuit has joined the *Delaware Valley II* plurality in finding that contingency enhancements are never available. *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991)(*en banc*).

*Amici* submit that the D.C. Circuit decided the issue correctly. *Amici* subscribe fully to that court's well-reasoned decision and thus will not repeat each of the court's arguments here. Nonetheless, WLF wishes to stress several points.

First, as a practical matter there is no middle ground between routinely awarding contingency enhancements or not awarding them at all. Once a court determines that a particular legal market requires contingency enhancements in order for deserving plaintiffs to obtain adequate legal representation, then every attorney in that market will be entitled to upward adjustments from the lodestar amount. Judicial resources are simply too scarce to permit the issue of whether a particular legal market requires contingency enhancements to be relitigated every time a plaintiff



prevails in a suit brought under a fee-shifting statute. Given a choice between always awarding enhancements or never doing so, this Court's prior pronouncements that the lodestar fee is a presumptively reasonable fee and that it should be adjusted upward only in "rare" and "exceptional" cases suggests that the Court opt for never awarding contingency enhancements.

Second, the only type of evidence readily available to attorneys seeking contingency enhancement has been affidavits from other lawyers stating that they do not take cases on a non-fee-paying basis or that they would not have taken the plaintiff's case without any prospect of contingency enhancements. As noted above, the essentially self-serving nature of all such affidavits, plus the fact that they ask attorneys to speculate what they would have done under hypothetical circumstances long since past, deprive such affidavits of virtually all of their evidentiary value. Moreover, such evidence inevitable requires district courts to delve into the strength of the plaintiff's case at the time the complaint was filed, an inquiry that all nine *Delaware Valley II* justices condemned. Accordingly, rather than requiring district courts to continue to undertake these types of factual inquiries, the Court should simply declare that contingency enhancements are never available.

Third, once one accepts the propriety of contingency enhancements, there is no limiting principle that would place a cap on the level of permissible enhancements. It is undoubtedly true that the higher the level of permissible contingency enhancements, the stronger will be the enforcement of the civil rights and environmental laws that contain fee-shifting provisions. If 100% contingency enhancement leads to strong enforcement of the civil rights/environmental laws, then surely 200% contingency enhancement would lead to even stronger enforcement, and 1000% contingency enhancement would result in a plaintiff's civil rights/environmental law attorney opening up shop on every block. *Amici* believe that American society is already suffering from an overabundance of lawyers and litigation. Given the degree to which the business

community is being overburdened by the costs of defending nonmeritorious civil rights and enviromental law complaints,[9] the last thing we need to be doing is thinking up ways to encourage more lawyers to get involved in bringing civil rights/environmental lawsuits, at least in the absence of evidence that significant numbers of plaintiffs with meritorious claims have been unable to retain legal counsel.

Finally, the Court should not lose sight of the fact that the federal fee-shifting statutes are intended to assist private citizens in asserting their rights, not to provide a full-employment scheme for lawyers. Much of the focus of those who support contingency enhancements has been on why it is uneconomical for lawyers to take civil rights and environmental cases on other than an hourly-fee basis. *Amici* respectfully suggest that those who focus on the plight of attorneys trying to make a go of a civil rights or environmental law practice are focusing on the wrong parties. If one focuses instead on those wishing to assert claims, it becomes immediately apparent that there is no shortage of lawyers willing to take their cases on a non-fee-paying basis -- how else can one explain the large number of fee award disputes now flooding the federal courts? Whether lawyers take such cases because they wish to provide a money-losing public service, or because they have not yet figured out what the American Bar Association keeps trying to tell them (that one cannot make a go of a civil rights or environmental law practice in the absence of contingency enhancements), or because (just maybe) they would not have available sufficient fee-paying

[9] For example, one indication that a claim filed under Title VII of the Civil Rights Act of 1964 may have merit is a finding by the Equal Employment Opportunity Commission that there is probable cause to believe that a Title VII violation has occurred. The EEOC makes such a finding in only a small fraction of its investigations. In its fiscal year 1989, the EEOC determined the merits of 66,209 charges that had been filed with it, and found merit in only 11,516 (16.8%) of those charges. Office of Program Operations, EEOC, Annual Report for Fiscal Year 1989, at B2.



business to keep themselves fully occupied if they stopped taking civil rights and environmental law cases, the fact remains that many very competent lawyers regularly take such cases on a non-fee-paying basis.

In sum, the federal fee-shifting statutes provide for the award of "reasonable" attorney fees to prevailing parties, and there is no valid reason for concluding that award of the lodestar amount does not provide a "reasonable" fee, even in cases where the plaintiff's attorney has assumed the risk of non-recovery of fees in the event that his client does not prevail.

## CONCLUSION

For all the foregoing reasons, *amici curiae* Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court reverse that portion of the decision of the United States Court of Appeals for the Second Circuit that affirmed the award to Respondents of a 25% contingency enhancement to their lodestar fee award.

Respectfully submitted,

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